

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**IVAN FOLSOM**

Claimant

VS.

## DEFFENBAUGH DISPOSAL SERVICES

Respondent

AND

**HARTFORD ACCIDENT and INDEMNITY**

Insurance Carrier

Docket No. 208,216

## ORDER

Claimant requested Appeals Board review of the January 9, 1998, Award entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument on July 21, 1998, in Kansas City, Kansas.

## APPEARANCES

Claimant appeared by his attorney, W. Fredrick Zimmerman of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Steven C. Alberg of Overland Park, Kansas.

## RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Administrative Law Judge's Award.

## ISSUES

The Administrative Law Judge found claimant suffered an accidental injury while employed by the respondent on September 13, 1995. Claimant injured his low back while performing his regular work activities as a refuse truck driver. The Administrative Law Judge awarded claimant temporary total disability compensation, future medical treatment

and unauthorized medical expense upon application and approval of the Director. The Administrative Law Judge found claimant had failed to prove he suffered a permanent injury as the result of the work-related accident.

Claimant appealed and contends he proved he is entitled to permanent partial disability benefits based on permanent impairment of function directly related to the September 13, 1995, work injury. Additionally, the claimant contends he is entitled to temporary total disability compensation in excess of the 7.14 weeks awarded by the Administrative Law Judge.

At oral argument, respondent requested the Appeals Board to review whether claimant proved he suffered a work-related injury and whether claimant should be entitled to future medical treatment upon application and approval of the Director.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

(1) At the time of the alleged accident, claimant was working alone and no one witnessed the accident. Respondent argues the record establishes claimant completely lacks credibility. Thus, the respondent contends, since claimant cannot be believed, the claimant has failed to prove he suffered a work-related back injury.

The Appeals Board finds the Administrative Law Judge's conclusion that claimant did sustain a work-related low-back injury while employed by the respondent should be affirmed. This conclusion is supported by claimant's testimony and contemporaneous medical records which are consistent with claimant's description of his accident. Claimant testified he was struck by an automobile backing up as he was coming around the rear of his refuse truck while he was picking up refuse in an apartment complex located in Wyandotte County, Kansas.

(2) For the reasons set forth in the Administrative Law Judge's Award, the Appeals Board finds the Administrative Law Judge's conclusion, that claimant failed to prove he suffered a permanent injury and his workers compensation benefits are limited to 7.14 weeks of temporary total disability compensation, should be affirmed.

Furthermore, the Appeals Board concludes the Administrative Law Judge's Award, as it relates to this issue, sets out findings of fact and conclusions of law that are accurate and supported by the record. It is not necessary to repeat those findings and conclusions in this order. Therefore, the Appeals Board adopts the Administrative Law Judge's findings and conclusions as its own as if specifically set forth herein.

Specifically, the Appeals Board finds, as the Administrative Law Judge also found, orthopedic surgeon Dr. Jeffrey T. MacMillan's testimony persuasive in regard to the nature and extent of claimant's injury. On November 15, 1996, Dr. MacMillan took a history from the claimant, conducted a physical examination of the claimant, and reviewed medical treatment records. He also, at a later date, reviewed a surveillance videotape of claimant's activities on October 25, 1996. The doctor also had medical treatment records from a previous work-related back injury that occurred on December 23, 1991.

On the day of the examination, claimant related to Dr. MacMillan that his low-back injury was so debilitating that he was unable to even perform minor household chores, could not carry groceries, was unable to lift his young children, and spent his entire day watching television.

The doctor reviewed the surveillance videotape of claimant's activities on October 25, 1996. Those activities took place only approximately three weeks before he examined the claimant. The videotape showed claimant, performing among other activities, trimming limbs from trees located at a residence. Claimant was able to carry a chain saw hooked onto a tool belt around his waist and climb a large tree utilizing only his hands and spike boots. After claimant was in the tree, he then, from an awkward position, used the chain saw to trim limbs from the tree.

After reviewing the videotape, Dr. MacMillan concluded that claimant's complaints were completely inconsistent with the activities the claimant was able to perform on the videotape. Dr. MacMillan also found claimant's range of motion measurements were invalid and that claimant was a malingerer.

Based on the MRI examination findings of degenerative disc disease and a slight left sided bulge at L5-S1, the doctor imposed a 5 percent functional impairment rating. Dr. MacMillan, however, found no significant difference between the 1992 MRI examination and the 1995 MRI examination. Dr. MacMillan then concluded that since claimant had settled his 1991 work-related injury based on the 7.5 percent permanent impairment of function, claimant had no additional functional impairment as a result of his September 13, 1995, work injury.

The respondent contends the record does not support an award entitling claimant to 7.14 weeks of temporary total disability compensation. In contrast, the claimant argues he is entitled to some 22 weeks of temporary total disability compensation from September 14, 1995, through February 12, 1996. Claimant argues that Dr. Carl Foster, his treating physician, did not release him to return to regular work until February 12, 1996.

The Appeals Board finds the Administrative Law Judge's Award of temporary total disability compensation should be affirmed. Dr. Foster referred claimant to neurosurgeon Stephen L. Reintjes, M.D., for a second opinion. However, claimant missed his first appointment with Dr. Reintjes on November 8, 1995, and also missed two other

appointments. The Administrative Law Judge awarded claimant temporary total disability compensation benefits for the period from the day after his accident, September 14, 1995, excluding three days claimant returned to work for the respondent, until he missed the November 8, 1995, appointment with Dr. Reintjes.<sup>1</sup> After this missed appointment, the record is unclear as to claimant's activities and, further, does not indicate whether claimant was capable or was not capable of working.

(3) The Administrative Law Judge found claimant entitled to future medical treatment upon application and approval of the Director. The respondent contends, since claimant did not suffer a permanent injury, he is not eligible for future medical treatment. The Appeals Board agrees with the respondent and reverses the Administrative Law Judge on this issue.

The Appeals Board concludes, based on the facts and circumstances of this case, since claimant did not suffer a permanent injury, he is not entitled to future medical treatment.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the January 9, 1998, Award entered by Administrative Law Judge Robert H. Foerschler should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Ivan Folsom, and against the respondent, Deffenbaugh Disposal Services, and its insurance carrier, Hartford Accident & Indemnity, for an accidental injury which occurred September 13, 1995, and based upon an average weekly wage of \$342.02.

The claimant is entitled to 7.57 weeks of temporary total disability compensation at the rate of \$228.02 per week or \$1,726.11, less any amounts previously paid.

All authorized medical expenses are ordered paid by the respondent.

Any unauthorized medical expense is ordered paid by respondent in accordance with K.S.A. 44-510(c)(2).

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<sup>1</sup>Please note the correct number of weeks for the period of September 14, 1995, through November 8, 1995, minus 3 working days, is 7.57 weeks instead of the 7.14 weeks awarded by the Administrative Law Judge. The Appeals Board has corrected this error in the computation of the award.

The Appeals Board adopts the assessment of costs of transcripts against the respondent and its insurance carrier as set forth in the Award.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: W. Fredrick Zimmerman, Kansas City, KS  
Steven C. Alberg, Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director